JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

Primus (M) Sdn Bhd v EON Capital Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO D-24-NCC-328 OF 2010
ANANTHAM KASINATHER J
31 JANUARY 2011

Companies and Corporations — Meetings — Extraordinary general meeting — Motion for adjournment of extraordinary general meeting — Chairman refused to put motion to vote — Whether meeting contravened articles of association — Whether meeting a nullity — Whether resolutions passed thereat void

Companies and Corporations — Meetings — Chairman — Removal of — No specific provision in articles of association for removal of chairman at general meeting — Whether chairman obliged to put motion to vote — Whether chairman's refusal justified

On 1 September 2010, the company convened an extraordinary general meeting ('EGM') to be held on 27 September 2010. The EGM was in relation to the proposed disposal of the entire assets and liabilities of the company to Hong Leong Bank Bhd and the proposed distribution of the cash proceeds arising from the proposed disposal to all entitled shareholders of the company. At the outset of the EGM, Public Nominees (Asing) Sdn Bhd ('PNASB'), a registered shareholder of the company, moved a motion to adjourn the EGM. The corporate representative of the plaintiff, a registered shareholder of the defendant, seconded the said motion. The chairman of the EGM refused to put the said motion for adjournment by contending that he had discretion whether or not to do so. As a result of the chairman's refusal, PNASB moved a motion to remove him as the chairman, which was again seconded by the corporate representative of the plaintiff. Again, the chairman refused to put the said motion, for his removal, to a vote. The corporate representative of PNASB and the plaintiff respectively then left the EGM. The EGM then proceeded as scheduled and the resolutions pursuant to the notice were passed. The issues raised for the determination of this court are as follows: (i) whether the chairman of the meeting held on 27 September 2010 contravened article 63 of the articles of association ('AA') of the defendant by refusing to put the motion for adjournment to vote; (ii) if the answer to the above question was in the affirmative, did the chairman's contravention of article 63 invalidated the business conducted thereafter at the meeting?

Held, allowing the plaintiff's claim in part:

(1) The chairman of the meeting of 27 September 2010 had no discretion

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

when confronted with a properly seconded motion for the adjournment of the meeting pursuant to article 63. In relation to the contention that the chairman's common law right to adjourn supercedes article 63, this court is of the opinion that the said common law right only avails the chairman if there is disorder at the meeting so as to render article 63 to be inoperable (see para 14).

(2) As regards the motion for the removal of the chairman, this court disagreed with the submission by the plaintiff that the chairman was obliged to put the motion to vote. This is because unlike article 63, article 110 stipulates the manner in which a chairman of the meeting is elected and by article 62, it is this person elected according to article 110 who is entitled to be the chairman of the meeting. There is no specific provision in the AA for the removal of a chairman at the general meeting. Given the mechanism for the appointment of the chairman and the absence of any specific provision for the removal of the chairman at the general meeting, this court agreed with the submission for the defendant that the chairman's refusal to put the motion to replace him as chairman was justified (see para 15).

(3) None of the four cases relied on by the plaintiff are authority for the proposition that the chairman's contravention of article 63 rendered the meeting a nullity and the resolutions passed thereat void. Whilst the leading judgment of Sir Nicolas Browne-Wilkinson VC in *Byng*'s case supported the legal proposition put forward by counsel as regards the interpretation of article 63, it does not support the proposition as regards the implications on the business conducted in a meeting following any contravention of article 63 (see para 29).

[Bahasa Malaysia summary

Pada 1 September 2010, syarikat tersebut telah mengadakan mesyuarat agung luar biasa ('EGM') yang akan diadakan pada 27 September 2010. EGM itu adalah berkaitan cadangan pelupusan semua aset dan liabiliti syarikat kepada Hong Leong Bank Bhd dan cadangan pengagihan hasil tunai yang diperoleh daripada cadangan pelupusan itu kepada semua pemegang saham syarikat yang berhak. Pada awal EGM, Public Nominees (Asing) Sdn Bhd ('PNASB'), pemegang saham berdaftar syarikat, telah mengemukakan usul untuk menangguhkan EGM. Wakil korporat plaintif, pemegang saham berdaftar defendan, telah menyokong usul tersebut. Pengerusi EGM enggan menerima usul penangguhan tersebut dengan berhujah bahawa dia mempunyai budi bicara sama ada atau tidak berbuat demikian. Akibat keengganan pengerusi, PNASB telah mengemukakan usul untuk menyingkirnya sebagai pengerusi, yang sekali lagi disokong oleh wakil korporat plaintif. Sekali lagi, pengerusi enggan menerima usul tersebut, untuk penyingkirannya, sebagai undian. Wakil korporat PNASB dan plaintif masing-masing kemudian telah meninggalkan EGM. EGM itu kemudian diteruskan seperti dijadualkan dan

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

resolusi menurut notis telah diluluskan. Isu-isu yang ditimbulkan untuk ditentukan oleh mahkamah ini adalah seperti berikut: (i) sama ada pengerusi mesyuarat yang diadakan pada 27 September 2010 melanggar artikel 63 tataurusan persatuan ('AA') defendan kerana enggan menerima usul penangguhan untuk diundi; (ii) jika jawapan kepada persoalan di atas adalah ya, adakah perlanggaran artikel 63 menjadikan perniagaan yang dijalankan selepas mesyuarat itu tidak sah?

Diputuskan, membenarkan sebahagian tuntutan plaintif:

(1) Pengerusi mesyuarat 27 September 2010 tiada budi bicara apabila berhadapan dengan usul penangguhan mesyuarat yang telah disokong dengan wajar menurut artikel 63. Berkaitan hujahan hak *common law* pengerusi untuk membuat penangguhan menggantikan artikel 63, mahkamah ini berpendapat bahawa hak *common law* tersebut hanya dapat digunakan oleh pengerusi jika terdapat gangguan semasa mesyuarat sehingga menjadikan artikel 63 tidak dapat beroperasi (lihat perenggan 14).

(2) Berhubung usul untuk menyingkir pengerusi, mahkamah ini tidak bersetuju dengan hujahan plaintif bahawa pengerusi mempunyai tanggungjawab meletakkan usul untuk undian. Ini adalah kerana tidak seperti artikel 63, artikel 110 menetapkan cara bagaimana pengerusi mesyuarat dilantik dan oleh artikel 62, ia adalah orang yang dilantik menurut artikel 110 yang berhak menjadi pengerusi mesyuarat. Tiada peruntukan spesifik dalam AA untuk penyingkiran pengerusi di mesyuarat agung. Berdasarkan mekanisme untuk pelantikan pengerusi dan ketiadaan apa-apa peruntukan spesifik untuk penyingkiran pengerusi di mesyuarat agung, mahkamah ini bersetuju dengan hujah defendan bahawa keengganan pengerusi meletakkan usul bagi menggantikannya sebagai pengerusi telah dijustifikasikan (lihat perenggan 15).

(3) Tiada mana-mana daripada empat kes yang digunakan oleh plaintif merupakan autoriti untuk cadangan agar percanggahan artikel 63 pengerusi itu telah menjadikan mesyuarat itu terbatal dan resolusi yang diluluskan tidak sah. Meskipun penghakiman terkemuka Sir Nicolas Browne-Wilkinson VC dalam kes *Byng* menyokong cadangan perundangan yang dikemukakan oleh peguam berkaitan pentafsiran artikel 63, ia tidak menyokong cadangan berkaitan implikasi ke atas perniagaan yang dijalankan dalam mesyuarat berikutan apa-apa percanggahan artikel 63 (lihat perenggan 29).]

Notes

For cases on extraordinary general meeting, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 493–501.

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

Cases referred to

Byng v London Life Association Ltd and another [1989] BCLC 400, CA (refd)
CepatWawasan Group Bhd v Datuk Lo Fui Ming & Ors [2005] 2 MLJ 57, CA (refd)
Henderson v Bank of Australasia (1890) 45 Ch D 330, CA (not folld)
John v Rees and others [1970] 1 Ch D 345 (refd)
Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors [1992] 2 MLJ 10, HC (not folld)
Mckerlie and another v Drillsearch Energy Ltd and others (2009) NSWSC 288 (refd)
Pender v Lushington (1877) 6 Ch D 70 (not folld)
Phosphate Resources Ltd, Re (2006) ACSR 169 (not folld)
Salisbury Gold Mining Company, Limited v Hathorn and others [1897] AC 268, PC (refd)
Stanham v The National Trust of Australia (NSW) (1989) 7 ACLC 628 (refd)

SC Loh (Ranjit, Robert Low, Kelvin Seet, Wong Mun Hoe, Choo June Ling & Kelly Khoo with him) (Ranjit Singh & Yeoh) for the plaintiff.
David Morais (S Ramesh and Gary Yap with him) (M David Morais) for the defendant.
S Suhendran (SY Soh with him) (Kadir Andri & Partners) for the interveners.

Anantham Kasinather J:

BACKGROUND FACTS

[1] The plaintiff is a registered shareholder of the defendant. On 1 September 2010, the company convened an extraordinary general meeting to be held on 27 September 2010 ('EGM'). The EGM was in relation to:

(a) the proposed disposal of the entire assets and liabilities of the company to Hong Leong Bank Bhd for a cash consideration of RM5,060,423,743.60; and

(b) the proposed distribution of the cash proceeds arising from the proposed disposal to all entitled shareholders of the company via a proposed special dividend and proposed capital repayment, and the proposed issuance of two new ordinary shares of RM1,00 each in the company at par.

[2] At the outset of the EGM, Public Nominees (Asing) Sdn Bhd ('PNASB'), a registered shareholder of the company moved for a motion to adjourn the EGM. The corporate representative of the plaintiff seconded this said motion.

[3] The chairman of the EGM refused to put the said motion for adjournment to a vote. In essence, the chairman sought to justify this refusal by contending that he has discretion on whether to put the motion for an

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

adjournment to a vote. As a result of the chairman's refusal to put the motion for adjournment, PNASB moved a motion to remove him as the chairman, which was again seconded by the corporate representative of the plaintiff. Again, the chairman refused to put the said motion for his removal to a vote. The corporate representative of PNASB and the plaintiff respectively then left the EGM. The EGM then proceeded and the resolutions pursuant to the notice were passed.

ISSUES

(a) Did the chairman of the meeting held on 27 September 2010 contravene article 63 of the article of association ('AA') of the defendant by refusing to put the motion for adjournment to vote?

(b) If the answer to the first question is in the affirmative, did the chairman's contravention of article 63 invalidate the business conducted thereafter at the meeting?

RELEVANT ARTICLES

[4] The answer to this question requires a close examination of article 63 of the defendant. Article 63 provides as follows:

> The Chairman may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting) adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting except business which might lawfully have been transacted at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an annual general meeting. Save as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

THE FIRST ISSUE

The plaintiff's case

[5] Counsel for the plaintiff submitted that the words 'and shall if so ordered by the defendant' in article 63 affirms the common law rule that the discretionary power whether to adjourn or not is vested exclusively in the members of a meeting. Counsel submitted that the pronouncements of Lord Herschell in the PC case of *Salisbury Gold Mining Company, Limited v Hathorn and others* [1897] AC 268, should not be relied upon in answering the question posed above because, His Lordship, in that case was concerned to construe the

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

66th clause of the AA of that company and which clause is materially different. Counsel was probably referring to that part of the judgment of His Lordship when he said and I quote:

> Their Lordships are of opinion that upon the true construction of article 66 the chairman is not bound to adjourn the meeting even though a majority of those present desire the adjournment. If the intention had been that the majority of the members present should have the right to adjourn the meeting whenever they pleased, Their Lordships think the article would have been differently worded. According to the terms of article 66 it is the 'Chairman' who may adjourn the meeting: it is to be his act, not that of the meeting or of those present at it. He cannot, it is true, adjourn it of his own mere motion, but the terms in which the members present are given a controlling voice strengthens the view that the adjournment is to be the act of the chairman. It provides for the 'consent' of the members present, which implies that the act is not theirs, but his. It is said that there is an inherent power in any meeting to determine on an adjournment if it pleases, and that it is the duty of the chairman to put any motion for that purpose made and seconded. Whether this be so or not in a case where no such articles are to be found as those now under consideration, Their Lordships do not think it can be so in a case where the articles have expressly prescribed the conditions under which an adjournment may take place.

[6] The thrust of counsel's submission was that the words 'and shall if so ordered by the defendant' in article 63 clearly reflects the 'intention' that was missing in the 66th article in the *Salisbury*'s case but present in this case to transfer the discretionary power whether to adjourn or not to the members of the meeting. That being the case, the chairman was wrong, in law, to refuse to put the motion for adjournment and the removal of the chairman, to the members to ascertain the wishes of the majority of the members on this motion.

The defendant's case

[7] Counsel for the defendant does not dispute the procedural propriety of the motion for adjournment. His submission is that the refusal to put the motion for adjournment was necessary, lawful and a proper exercise of the chairman's discretion premised on the following:

(a) the chairman has the primary task of ensuring that the meeting proceeds with its intended object;

(b) the chairman has the discretion to refuse to put a motion for adjournment to vote; and

(c) the chairman had properly exercised that discretion.

[8] In other words, the discretion on procedural motions including the

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

motion for an adjournment, notwithstanding, the words 'and shall if so ordered by the defendant' remains with the chairman of the meeting. Both counsel for the defendant and the intervener submit that this must be necessarily be so since the primary duty of a chairman is to facilitate the purpose for which the meeting was called ie to deliberate upon the substantive motions. This primary duty was described by Justice Barrett J in *Mckerlie and another v Drillsearch Energy Ltd and others* (2009) NSWSC 288 as being 'the proper purpose requirement' (see p 295). Counsel for the intervener also contended that the decision to put (or decline to put) a motion to adjourn is governed by common law principles and not article 63.

LAW ON ARTICLE 63

[9] Fortunately, the first issue has already been the subject of judicial interpretation. The English Court of Appeal was called upon to interpret article 18 which is pari materia with article 63 of the AA of the defendant in the case of *Byng v London Life Association Ltd and another* [1989] BCLC 400. I agree with counsel for the plaintiff that although the English Court of Appeal interpreted article 18 therein in the context of a chairman purporting to exercise his discretion to adjourn a meeting, nevertheless, His Lordship's pronouncements upon article 18 are relevant to the interpretation of article 63. Sir Nicolas Browne Wilkinson VC said at pp 410–411:

> What then is the effect of article 18 which expressly confers on the chairman power to adjourn but only with the consent of a quorate meeting? Counsel for the plaintiff submits that the chairman's power to adjourn having been expressly laid down and expressly circumscribed, there is no room for the chairman to have any implied power at common law. He relies on the decision of the Privy Council in *Salisbury Gold Mining Company, Limited v Hathorn and others* [1897] AC 268. In that case the articles provided that the chairman could adjourn with the consent of the members' the articles did not provide (as does article 18 in the present case) that the chairman was bound to adjourn if so directed by the meeting. It was held that the chairman was not bound to put a motion for adjournment to the meeting but was entitled to insist in the meeting proceeding to business. Lord Herschell treated the express provision making in the chairman's decision whether or not to adjourn as ousting the general rule that a meeting can always adjourn itself. So, by analogy, counsel for the plaintiff argues that the express provision in article 18 requiring the chairman to obtain the consent of the meeting as a precondition to the exercise of his power to adjourn precludes the existence of any power in the chairman to adjourn without such consent. Like the judge, I reject this submission. In my judgment article 18 regulates the chairman's powers of adjournment to the extent that its machinery is effective to cover the contingencies which occur. Therefore if the circumstances are such that it is possible to discover whether or not the meeting agrees to an adjournment, article 18 lays down a comprehensive code …

[10] Mustill LJ expressed the same view of article 18 when he said:

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

> Nor do I regard the presence of article 18 as a ground for concluding that a power to prorogue cannot in the present case be implied. The purpose of article 18 is to enable the meeting to validate, by a motion properly proposed and carried, a decision to adjourn. The powers under the article are capable of employment only if the meeting is in a condition to conduct its business in an orderly manner. This is just the situation in which the implied power to prorogue comes into existence, and I cannot see how the presence of article 18, which ex hypothesis is inoperable, can have any effect on the implication which would otherwise have been made (see p 416).

[11] In my judgment, this case is authority for proposition that so long as the wishes of the majority can be ascertained, then, article 63 requires the chairman to do just that. The function of a chairman of a meeting in the words of Justice Megarry in the case of *John v Rees and others* [1970] 1 Ch 345 are:

> The first duty of the chairman of a meeting is to keep order if he can. If there is disorder, his duty, I think, is to make earnest and sustained efforts to restore order, and for this purpose to summon to his aid any officers or others whose assistance is available. If all his efforts are in vain, he should endeavour to put into operation whatever provisions for adjournment there are in the rules, as by obtaining a resolution to adjourn. If this proves impossible, he should exercise his inherent power to adjourn the meeting for a short while, such as 15 minutes, taking due steps to ensure so far as possible that all present know of this adjournment.

[12] The Malaysian Court of Appeal had occasion to consider the pronouncements of Sir Nicolas Browne-Wilkinson VC and Justice Megarry in *CepatWawasan Group Bhd v Datuk Lo Fui Ming & Ors* [2005] 2 MLJ 57. Abdul Aziz JCA (as he then was) after considering the pronouncements of Sir Nicolas Browne-Wilkinson VC had this to say in p 65 of the reported judgment:

> We understood those passages to mean that article 18 (in our case article 61) must be complied with, that is to say, the consent of the meeting to an adjournment must be obtained, if it is possible to discover whether or not it agrees to an adjournment. In that event what the article lays down, namely, the need for consent, is a 'comprehensive code', that is to say, it excludes any exception available under the common law. Even though the chairman has a 'fundamental common law duty … To regulate proceedings so as to enable those entitled to be present and to vote to be heard and to vote', and he believes that objective cannot be attained unless the meeting is adjourned to some other time or date or place, he can adjourn the meeting without the consent of the meeting only if it is not possible to discover the wishes of the meeting. If it is possible to ascertain the wishes of the meeting, the chairman must act according to them, so that if the meeting does not consent to an adjournment, the meeting must proceed, even though there may be risks of whatever nature in proceeding. The wisdom in proceeding or not proceeding is a matter to be left entirely to the meeting if its wishes can be ascertained.

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

[13] His Lordship with reference to the passage in the judgment of Justice Megarry quoted earlier in this judgment observed:

> That passage means that the chairman's inherent power to adjourn a meeting is only available to be exercised when it 'proves impossible' 'to put into operation whatever provisions for adjournment there are in the rules, as by obtaining a resolution to adjourn'. If it is possible to obtain a resolution to adjourn, the chairman does not have the inherent power to adjourn and if he adjourns without a resolution the adjournment is wrong even if done in good faith and for a reasonably necessary time.

DECISION ON FIRST ISSUE

[14] Accordingly, I have little hesitation in holding that the chairman of the meeting of 27 September 2010 had no discretion when confronted with a properly seconded motion for the adjournment of the meeting pursuant to article 63. In answer to the submission of counsel for the intervener that the chairman's common law right to adjourn supercedes article 63, in my opinion, this common law right only avails the chairman if there is disorder at the meeting so as to render article 63 to be inoperable.

[15] As regards the motion for the removal of the chairman, I disagree with counsel for the plaintiff that the chairman was obliged to put the motion to vote. In my opinion, unlike article 63 and 110 stipulates for the manner in which a chairman of the meeting is elected and by article 62 it is this person elected according to article 110 who is entitled to be the chairman of the meeting. I also observe that there is no specific provision in the AA for the removal of a chairman at the general meeting. Given the mechanism for the appointment of the chairman and the absence of any specific provision for the removal of the chairman at the general meeting, I agree with the submission of counsel for the defendant that the chairman's refusal to put the motion to replace him as chairman was justified.

SECOND ISSUE

[16] As regards, the second issue, counsel for the plaintiff submitted that the chairman's failure to comply with the article 63 rendered the meeting to be a nullity and the resolutions passed thereat void. Counsel urged the court to so declare.

[17] Counsel for the plaintiff relied on the following cases to support this proposition of law:

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

(a) *Re Phosphate Resources Ltd* (2006) ACSR 169;

(b) *Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors* [1992] 2 MLJ 10;

(c) *Herderson v Bank of Australasia* (1890) 45 Ch D 330 (CA)

(d) *Pender v Lushington* (1877) 6 Ch D 70;

[18] Before I proceed to examine the relevance of the ratio of the judgments in the aforesaid four cases to the issue at hand, I wish to cite a passage in the judgment of Sir Nicolas Browne-Wilkinson VC in the case of *Byng v London Life Association Ltd and another* [1989] BCLC 400 which appears to have escaped the attention of counsel before me. This passage reads as follows:

> *In my judgment there is no absolute rule of law that a meeting from which members are wrongly excluded is a nullity. The meeting, as such, can conduct no business, but it is nevertheless a meeting*. I can see no good reason why the law should shut its eyes to the reality that, in response to a notice convening them, certain members of the company have assembled together at what, in ordinary usage, would be called a meeting. What that meeting can validly do is quite another matter. (Emphasis added.)

[19] This passage, in my opinion, supports the legal proposition that any irregularity in the conduct of the meeting by the chairman does not detract from the fact that there was a valid meeting, so long as the meeting has been otherwise legally convened. In my opinion, this passage is also authority for the proposition that, notwithstanding, the validity of the meeting, the validity of the business conducted at this meeting following such irregularity depends on whether and to what extent, the rights of the members may have been compromised in the business that was conducted thereafter. My opinion is based on the passage preceding the above quoted passage in the judgment of Sir Nicolas Browne-Wilkinson VC which reads:

> In my judgment, the phrase 'invalid meeting', although useful as a shorthand description of a meeting at which no business can be validly transacted, is capable of giving rise to confusion. *The fact that a meeting cannot pass a valid resolution in certain circumstances* does not necessarily mean that there has been no meeting at all. Thus in many cases (including the present) the articles of a company provide that, in the event of there being no quorum present at a meeting, the meeting shall be adjourned for a fixed period. In such a case it is clear that the inquorate meeting was a meeting notwithstanding the fact that it could conduct no business. (Emphasis added.)

[20] My understanding of the above passages is that it is only in the case of an inquorate meeting that no business can be conducted at all. Incidentally, it is also so provided in article 59 of the AA of the defendant. In all other cases, the validity of the business conducted following any irregularity in the conduct of

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

the meeting by the chairman would depend on whether the proprietary rights of the members have been compromised so as to affect the integrity of the business conducted at the meeting. I am fortified incoming to this conclusion because Sir Nicolas Browne-Wilkinson VC after ruling that the chairman's decision 'to adjourn to the Cafe' Royal in the same afternoon was not valid on the ground either that he failed to take into account relevant factors or that the decision was Wednesbury unreasonable' thereafter proceeded to examine what impact this decision had on the business that was conducted thereafter. In my judgment, if the irregularity arising from the chairman's impugned ruling ipso facto rendered all resolutions passed thereafter to be invalid, His Lordship would not have thereafter proceeded to examine what happened at the meeting. Instead, His Lordship, then, proceeded to hold the resolutions passed at the meeting to be invalid because the chairman's decision to adjourn the meeting to the afternoon resulted in the meeting proceeding in the absence of a number of members who had taken the trouble to attend the original meeting but who could not even lodge a proxy vote. This, according to His Lordship compromised 'a matter of central importance' (see para G–H of p 413 of the judgment of Sir Nicolas Browne-Wilkinson VC). The matter of central importance being 'that the form of the adjournment was such as undoubtedly to preclude certain members from taking any part in the meeting either by way of debate or by way of vote'.

[21] In my judgment, the reasoning behind the aforesaid pronouncements of Sir Nicolas Browne-Wilkinson VC and His Lordship's decision are both logical and sensible because whilst a failure to put a motion for adjournment is only a procedural breach, the exclusion of members from a meeting thereby preventing them from deliberating and voting on the substantive motions affecting business of the company compromises their proprietary rights as members. As such, any infringement of their propriety rights, in most circumstances, would invariably result in the invalidation of the resolutions passed at the business conducted in the ensuing meeting. This is precisely what happened in *Byng*'s case. Another rationale is that a failure to put a motion for adjournment, relates to internal management and consequently is a wrong done to the company. In which case, it is for the company to complain and rectify the wrong, if need be, but no rights accrue to the member arising there from (see *Stanham v The National Trust of Australia (NSW)* (1989) 7 ACLC 628). However, where the irregularity arising from the conduct of a chairman compromises 'a matter of central importance' to use the words of Sir Nicolas Browne-Wilkinson VC such as the members rights to either deliberate or vote on the substantive resolutions, or both, then, it follows that the resolutions

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

passed will be invalidated. Counsel for the plaintiff in his well researched book *Company Law, Powers and Accountability*, Loh Siew Cheang and William Wong, appears to acknowledge this principle of law in para 3.2 at p 1309:

> In the context of the rule in *Foss v Harbottle*, an analysis of case law shows that a right of personal action accrues where the breach of an article affects rights partaking of a proprietary nature arising from the ownership of shares and *breaches which cannot be regarded as internal procedural irregularities which are capable of being ratified*.

[22] I acknowledge that the facts of *Byng*'s case differ from the facts of this case. However, the relevance of the leading judgment of Sir Nicolas Browne-Wilkinson VC in the decision of the Court of Appeal in *Byng*'s case is that like in this case, the court was dealing with the validity of the resolutions passed at the meeting following an irregularity in the conduct of the meeting made by the chairman of the meeting. On the facts of this case, the rights of the members were not compromised as the representatives of the plaintiff opted of their own volition to leave the meeting when the chairman refused to put their motions to the vote.

[23] I now propose to examine the four cases cited by counsel for the plaintiff to ascertain if there are any pronouncements in any of them to support the contrary proposition put forward by counsel. In the case of *Re Phosphate Resources Ltd* (2006) ACSR 169, following the approval of a scheme of arrangement by the members of the company, an application was made to the court for the approval of the scheme. The application was based on the premise that the members' approval was properly obtained. The trial judge refused to give the stamp of approval to the scheme because 'inter alia' His Lordship doubted the integrity of the process leading to the shareholders of the company resolving in favour of the scheme at the meeting of shareholders. His Lordship's finding was that a significant number of proxies which were likely to have made a difference to the outcome were disallowed, although these were received within time. That this is the basis for His Lordship questioning the members' approval is evident from this passage of His Lordship's judgment:

> In my opinion the disallowance of the proxies in question had its origins in the misconstruction of the court order. It is at least a probable result that a significant number of shareholders were deprived of the right to exercise their vote at the meeting on Christmas Island and it appears, on the balance of probabilities at least, that their vote would have resulted in the resolution being defeated.

[24] In the case of *Henderson v Bank of Australasia* (1890) 45 Ch D 330, the chairman wrongly refused to put a motion to vote concerning an amendment to the resolution which was to be considered by the members. Lord Justice Cotton in setting aside the resolution opined to the following effect.

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

> I think, then, that the chairman was entirely wrong in refusing to put the amendment, and that the resolutions which were passed cannot be allowed to stand, because the chairman, under a mistaken idea as to what the law was which ought to have regulated his conduct, *prevented a material question from being brought before the meeting* (at p 347) (Emphasis added.)

[25] In other words, the resolution was set aside because His Lordship was of the view that arising from the chairman's conduct, the members were deprived of voting on 'a material question' ie an amendment that was within the notice calling the meeting and which related to who was entitled to vote on the substantive resolution.

[26] In the case of *Lim Hean Pin*, the court set aside the resolutions passed at the AGM of the company because the chairman of the meeting had wrongly excluded certain proxy holders from voting at the meeting. Justice Edger Joseph Jr (as he then was) in setting aside the resolutions ruled that ignoring a members vote is not a mere irregularity which can be cured by the majority. His Lordship also expressed the opinion that the fact that the vote of the wrongly excluded proxy holders would not have made a difference to the outcome of the vote is an irrelevant consideration in determining the validity of the resolutions. Counsel for the plaintiff contended that similarly here the denial of the right to vote is not a mere irregularity and the fact that the outcome of the resolution for adjournment was uncertain is irrelevant.

[27] With respect, there is no merit in this submission of counsel because the pronouncements of the judge were made in the context of the substantive resolutions affecting the business of the company tabled at the AGM of the company and not on a procedural motion, as is the case here. This is evident from the pronouncements of His Lordship at p 34 of the reported judgment:

> In my view, excluding the proxy and thus preventing the plaintiff from exercising his statutory right to vote was not a mere procedural irregularity curable by the majority but an illegality since it was an abuse of power or oppression on the minority which vitiated and therefore rendered null and void the AGM and all resolutions passed thereat.
>
> Looking back, *I would emphasise that the right to vote is one of a member's fundamental rights for it is by his vote that he gets his voice heard in the company's affairs*. That being so, the submission that even if the proxy Miss Kho Gaik Tee had not been excluded and had voted at the AGM, the result of the poll would have been the same, having regard to the fact that her principal the plaintiff was only a minor shareholder, is clearly untenable. (Emphasis added.)

[28] In other words, the 'fundamental right' that His Lordship was concerned with, was with regards the right of the member to have his voice heard 'in the company's affairs'. In my opinion, this case implicitly recognises

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

the difference, in law, between a member being excluded from voting on a procedural motion and a motion on a substantive resolution. Finally, there is the case of *Pender v Lushington* (1877) 6 Ch D 70. The facts in *Pender* also relate to a fact situation where a legitimate shareholder was precluded from voting at the general meeting of the company. In other words, the facts of this case also involved a member of the company being wrongly deprived the right to vote on a substantive resolution at the general meeting of the company.

DECISION ON THE SECOND ISSUE

[29] In my judgment, none of the four cases are authority for the proposition contended for by counsel for the plaintiff that the chairman's contravention of article 63 rendered the meeting a nullity and the resolutions passed thereat void. Since counsel for the plaintiff submitted that the locus classicus on matters relating to article 63 is the case of *Byng*, I have crafted this judgment following closely the leading judgment of Sir Nicolas Browne- Wilkinson VC in *Byng*'s case. In my judgment, whilst the judgment of Sir Nicolas Browne-Wilkinson VC supports the legal proposition put forward by counsel as regards the interpretation of article 63, it does not support the proposition as regards the implications on the business conducted in a meeting following any contravention of article 63.

ORDERS OF COURT

[30] I make the following orders in respect of encl 1:

(a) I declare that on a proper construction of article 63 of the AA of the defendant, the chairman of the meeting of the defendant held on 27 September 2010 ought to have put the properly seconded motion for adjournment to the vote.

(b) I decline to make any of the other declaratory orders sought by the plaintiff in encl 1.

(c) I order that each party bear its own costs in respect of encl 1. In my judgment, as article 63 was already the subject matter of judicial interpretation by the Court of Appeal in *CepatWawasan Group Bhd v Datuk Lo Fui Ming & Ors* [2005] 2 MLJ 57, the declaration made herein merely confirms what has already been decided by a superior court. Since the plaintiff has failed in all the other prayers sought by it in encl 1, I consider a fair order to be that each party bears its own costs.

JOBNAME: No Job Name PAGE: 15 SESS: 1 OUTPUT: Mon Nov 14 07:18:37 2011
//caseml/case/mlj/2011_009_mlj_828

[31] I take this opportunity to thank all counsel for the well researched submissions provided by them. I would not have been able to produce this judgment as quickly as I have, without the benefit of these submissions.

Plaintiff's claim allowed in part.

Reported by Ashgar Ali Ali Mohamed